United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1400

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

-against-

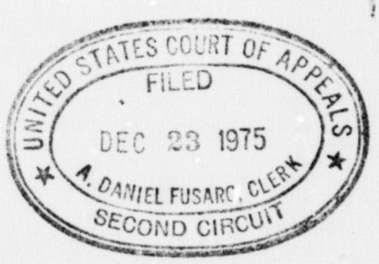
THOMAS GRANDE,

Defendant - Appellant.

DOCKET No. 75- 1400

APPEAL FROM THE UNITED
STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NEW YORK

APPELLANT'S BRIEF



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Title 18 United States Code Section 659 as applicable herein provides:

" § 659. Interstate or foreign shipments by carrier; State prosecutions

Whoever embezzles steals, or unlawfully takes, carrier away, or conceals, or by fraud or deception obtains from any pipeline system, railroad car, wagon, motor-truck, or other vehicle, or from any tank or storage facility, station, station house platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any good or chattels moving as or which are a part of or which constitute an interstate or foreighn shipment of freight, express or other property; or

Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen"

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- x

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

THOMAS GRANDE,

Defendant-Appellant.

- x

DOCKET No. 75-8354

STATEMENT

This is an appeal from the judgment of conviction rendered against the appellant on September 5, 1975 (Bartels, J.) after a jury trial (Bartels, J.) in the United States District Court for the Eastern District of New York.

Sentence imposed upon the conviction pursuant to United States Code Title 18, Section 3651 was: Three years imprisonment to serve one month; execution of the remainder suspended and a period of probation of two years, eleven months; and a fine of One Thousand Five Hundred Dollars.

Appellant is presently at liberty.

FACTS

Appellant was tried under indictment 74 CR 575 before a jury (Bartels, J.). Appelant, a retail butcher, was charged with receiving sides of beef stolen from an in-

terstate shipment.

The Government's case consisted of the testi-mony of Richard L. Noel and Roger Hedrick from the Dubuque Packing Company, Richard Wilson a former employee of Midwes Distributor as a semi-truckdriver (all companies located i Iowa); and Allen Garber a special agent of the Federal Bureau of Investigation.

The appellant did not testify and called no witnesses.

The testimony may be concisely stated as fol lows:

On or about April 22, 1974 the Dubuque Packi Company located in the state of Iowa prepared for shipment One Hundred and Ninety pieces of meat in a refrigerated trailer for shipment to Midtown Provisions, in the State o New York. Each piece of meat had the company's United Sta Department of Agriculture identification number '396' inke on it's side, and each had a red tag containing the name Dubuque Packing Company and the name of the purchaser. Th company shipped approximately Thirty Eight Thousand pounds per shipment into New York City and shipped an estimated total of Four Hundred Fifty Thousand pounds per week (tria transcript, p.27) into the City. Each piece bearing the identifying number '396' and the red tags.

Richard Wilson picked up the loaded trailer

on Friday, April 24, 1974 and drove to New York. Midtown Provisions was not prepared to unload the trailer and so at approximately 3:30 A.M. on April 25, 1974, the trailer was taken to a truck stop in Secaucus, New Jersey to await unloading on the following Monday.

The next morning the trailer was discovered to be missing. It was later recovered by the New York City Police. There was no evidence as to how many sides of beef were missing, but Mr. Wilson testified that he believed he started with a full load and estimated that half was missing.

On April 29, 1974 Special Agents Garber and Lagatol went to C & C Foods at 783 Saratoga Avenue in Brooklyn. Thomas Grande identified himself as the owner and apparently consented to a search of the premises. Nineteen sides of beef numbered '396' were found in the store refrigerators (three of those pieces had the Dubuque tag affixed).

Thomas Grande is alleged to have stated that on April 27, 1974 he purchased the beef in question at a discount from a man who stated that the meat came from a burned out store. He gave the Special Agent a general physical description and stated that one of the two men had called the other "Jimmy" or "Timmy". He had paid a total of One Thousand Five Hundred Dollars for the nineteen pieces. No one was able to establish that the nineteen pieces found in the defendants possession were part of the stolen beef.

QUESTIONS PRESENTED

1. Did the Government prove that the beef in the defendant's store was part of the stolen shipment?

2. Absent proof to support the allegation that the beef was stolen from an interstate shipment, is the presumption with respect to recent and unexplained possession of stolen property operative?

3. Was the circumstantial evidence sufficient to create the presumption?

4. Was there sufficient evidence to submit the case to a Petit Jury?

POINT ONE

The Government failed to prove that the property possessed by appellant had been stolen and therefore the common law inference of recent possession was inapplicable.

Appellant's conviction for violating title 18 U.S.C. 659 rests exclusively upon circumstantial evidence and requires the common law presumption established in WILSON v. UNITED STATES, 162 U,S, 613, 619 (1896) wherein the court stated:

> "Possession of the fruits of crime, recently after its commission, justifies the inference that the possession is guilty possession, and, though only prima facie evidence of guilt, may be of controlling weight unless explained by the circumstances or accounted for in some way consistent with innocense."

Clearly the inference may apply only after the fact is established that the goods in possession of the defendant are in fact the fruits of a crime. Put another way, the burden of proof is upon the Government to establish that the goods possessed were in fact stolen. Until that fact is established there is no proper foundation upon which the inference may be drawn.

In OVERSTOCK BOOK COMPANY v. BARRY, 436 F2d 1289 (2nd Cir,). This Court held at page 1294:

> "Use of such inferences is permissible in criminal cases at least when it can be said beyond a reasonable doubt, and perhaps when it is more likely than not, that the presumed fact flows from the proved fact."

More recently the ambiguity over the standard to be applied, i.e, whether beyond a reasonable doubt or more-likely-than-not, has been clarified in part at least in BARNES v. UNITED STATES, 412 U.S. 837, wherein the court stated at Page 843:

> "What has been established by the cases, however, is at least this: that if a statutory inference submitted to the jury as sufficient to support conviction satisfies the reasonable-doubt standard (that is, the evidence necessary to invoke the inference is sufficient for a rational juror to find the inferred fact beyond a reasonable doubt) as well as the more-likely-than-not standard, then it clearly accords with due process."

The inference above recited has its origin in the common law, and the same standard must be applied as evidenced by the following language at Pages 844-845,846:

> Common-law inferences, like their statutory counterparts must satisfy due process standards in light of experience.
>
> * * *
>
> Since the inference thus satisfies the reasonable-doubt standard, the most stringent standard the Court has applied in judging persmissive criminal law inferences, we conclude that it satisfies the requirements of due process.

The question presented is whether the evidence necessary to invoke the inference is sufficient for a rational juror to find the inferred fact beyond a reasonable doubt.

An analysis of the evidence must lead to an answer in the negative. The witnesses for the Government were totally unable to identify the nineteen pieces of beef found in appellant's store as being part of the original one hundred ninety-two pieces shipped from Dubuque, Iowa. Indeed as part of the Government's case statements of the appellant were permitted in evidence which showed that he paid for the beef, and did not believe the beef to be stolen. (See Trial transcripts July 17, 1975 pgs. 30-32).

The record is completely devoid of any fact tending to establish that the beef in question had been stolen. The evidence did establish that the Dubuque Packing Company shipped approximately four hundred fifty thousand pounds of beef into the New York City area each week, and that Midtown Provisions received two shipments per week of approximately thirty-eight thousand pounds each. Every piece of beef shipped would have the identification number (396) and the red tag found on the beef in appellant's possession (see trial transcript July 15, 1975, pgs. 26-28).

Since the Government had the burden of proof it had to establish beyond a reasonable doubt that appellant

knowingly possessed stolen goods. It was not sufficient to show that the goods possessed were "similar" to those stolen. This principle was clearly stated in KARN v. UNITE STATES , 158 F.2d 568 (9th Cir.) wherein the Government sought to prove that money in the defendant's possession was obtained as a result of a theft. The court at pages 571-2 stated:

> "It is true that actual possession of stolen property may be shown, but it is equally true that the prosecution must also prove, beyond a reasonable doubt, that the property found in possession of the accused is, in truth and in fact, the identical property which was stolen. A bare assertion that property in the hands of accused is "similar property" or property that "looks like it", is not sufficient to establish such property as the stolen property."

The Court unequivocally called for evidence proving the identity of the goods when at page 572 the court held:

> "We do not question the right of the prosecution to prove such matters by circumstantial evidence if such evidence be sufficient to create a legitimate and sustainable inference of guilt, which satisfies beyond a reasonable doubt the minds of the jurors. But the evidence here offered to show that the ten dollar bill was the identical bill that Hill had seen inthe cash register prior to the theft was so vague and unconvincing that it loses all probative weight in a case like this. It fails in respect to being convincing proof of the fact it sought to establish. The testimony of Hill regarding this bill reflects too much guesswork and uncertainty."

On this appeal appellant readily concedes the limited power of the court to review the evidence. This court has stated the rule in UNITED STATES v. AADAL, 368 F.2d 962 (2nd Cir.) when the court held, at Page 964:

> "We have only a limited power to review the evidence on which the jury based its verdict.
>
> "The test is whether, taking the evidence in the view most favorable to the government, there is substantial evidence to support the verdict. * * * This circuit has never held that circumstantial evidence, to be sufficient to convict, must exclude every reasonable hypothesis of innocence to be drawn from the evidence."

On appeal the reviewing court must view all evidence in a light most favorable to the government and must draw all reasonable inferences available to the trier of the facts in support of the verdict. (GLASSER v. UNITED STATES, 315 U.S. 60; UNITED STATES v. KOSS, 506 F.2d 1103; UNITED STATES v. FREEMAN 498 F.2d 569; UNITED STATES v. ROSNER 485 F.2d 1213). UNITED STATES v TRAMUNTI 500 F.2d 1334

Nevertheless, it is respectfully submitted that the evidence below was materially deficient, and lacked sufficient import to warrant jury consideration.

At best the government proved that beef shipped in interstate commerce was stolen and that it had at least statutory value. Although the court has rejected the

theory that inferences may not be based on inferences, this court has held in UNITED STATES v. RAVICH 421 F.2d 1196, (2nd Cir.) at page 1204 (Footnote 10):

> "The length of the chain of inferences necessary to connect the evidence with the ultimate fact to be proved necessarily lessens the probative value of the evidence, and may therefore render it more susceptible to exclusion as unduly confusing, prejudicial, or time-consuming, but it does not render the evidence irrelevant."

More recently this rule was reaffirmed in UNITED STATES v. TAYLOR, 464 F.2d 240, 244(2nd Cir.) and the court went a step further in holding that an inference may be drawn from the totality of the government's case, but the remaining question "would be whether the reasonable mind of a juror could draw such an inference from it so that he "might fairly conclude guilt beyond a reasonable doubt."

In a receiving case the court has held that the lack of an explanation as to innocent possession may have weight in determining the inference and its impact upon a particular set of facts. In UNITED STATES v. DeKUNCHAK 467 F.2d 432 (2nd Cir.) this court held at page 436:

> "Moreover, no explanation at all was proffered which would suggest that appellant's possession of the pharmaceutical was innocent. The surreptitious and furtive transfer provided ample evidence to support the inference that DeKunchak was fully aware that he was dealing in stolen chemicals."

Also, see: UNITED STATES v. BAUM, 482 F.2d 1325 (2nd Cir).

In support of its weak circumstancial case the government attempted to rely upon appellant's statements of explanation. It should not go unnoticed that the government called no witnesses nor brought forth any evidence to show that appellant's statements were either false, or in any manner an indication of a consciousness of guilt. Such evidence should not have been considered sufficient upon which to base a guilty verdict especially where the remaining evidence was consistent with an interpretation of innocence. This is a rule of this court recently restated in UNITED STATES v. JOHNSON, 513 F.2d 819 (2nd Cir). wherein the court stated at page 824:

> "...this Circuit in United States v. Kearse, 444 F.2d 62 (2Cir.1971), and United States v. McConney, 329 F.2d 467, 470 (2 Cir. 1964), has held that falsehood told by a defendant in the hope of extricating himself from suspicious circumstances are insufficient proof on which to convict where other evidence of guilt is weak and evidence before the court is a hospitable to an interpretation consistent with the defendant's innocence as it is to the Government's theory of guilt."

This court has set the standard to be applied in determing whether there was insufficient evidence of guilt to submit the question to a petit jury. In UNITED

STATES v. RIVERA 513 F.2d 519 (2nd Cir.), this court stated that the standard is

> "...a question to be determined under the standard we adopted in United States v. Taylor 464 F.2d 240 (2 Cir.1972) namely, whether, as said in Curley v. United States, 81 U.S. App. D.C. 389, 160 F.2d. 229, 232-33, cert.den., 331, U.S. 837, 67 S.Ct. 1511, 91 [ed.1850 (1947)], "upon the evidence,giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact. A reasonable mind might fairly conclude guilt beyond a reasonable doubt."

The jury in the instant case could not rely upon the presumption in order to establish guilty knowledge since the government did not and could not prove that the beef in the possession of appellant was part of the beef stolen from the shipment destined for Midtown Provisions. Absent the presumption there was no evidence to prove guilty knowledge, or that the appellant believed the beef to be stolen. Part of the government's case was appellants answers to questions at his prior trial. The governments evidence, uncontradicted, dispells any theory of guilty knowledge.

At Page 31 of the trial transcript of July 17, 1975, the following was read to the jury:

> "Question: Why didn't you call the wholesaler?
>
> Answer: I didn't feel it necessary to, I didn't think about it, I

thought it was perfectly legitimate."

The Government's case consisted of a very weak circumstantial evidence. It was weakned by the fact that they could not prove that the beef possessed had been stolen, and without identifying it as part of the hijacked beef, the Government was deprived of the common law presumption without the presumption, and absent additional evidence the case was a mass of guesswork and vague innuendo--- certainly not a sufficient amount of factual evidence upon which the jury, drawing all favorable inferences, could reasonably find guilt beyond a reasonable doubt.

The evidence before the court, in its totality, is:

> "as hospitable to an interpretation consistent with the defendant's innocence as it is to the Government's theory of guilt."

(UNITED STATES v. JOHNSON, supra) and should not have been submitted to the jury.

CONCLUSION

The judgment of conviction should be reversed and the indictment dismissed.

Respectfully submitted,

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